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No. 07-1259

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In the Supreme Court of the United States

RACHEL HAAS, et al.,

Petitioners,

v.

QUEST RECOVERY SERVICES, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly applied this Court's decision in *United States v. Georgia*, 546 U.S. 151 (2006), in determining that this case does not present the question whether Congress had validly abrogated the States' Eleventh Amendment immunity for claims brought under Title II of the Americans with Disabilities Act (ADA)?

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INTRODUCTION

Petitioner Rachel Haas presents no issue worthy of review. The constitutional issue she seeks to raise is not even presented here, and the sole issue squarely presented is merely the factbound question of whether Haas stated a disability discrimination claim. For these reasons, the State of Ohio agrees with the United States that the Court should deny review.

Haas claims that her lawsuit against the State of Ohio, brought in the context of accessibility to alcohol and drug rehabilitation services, raises the issue whether Congress validly abrogated the States' Eleventh Amendment immunity from suit under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 to 12165 ("ADA").

The Eleventh Amendment issue is not presented here, however, because the Sixth Circuit held that Haas failed to state a Title II claim, and that statutory hurdle prevented the court from even reaching the constitutional question. The court's statute-first approach followed not only the general, longstanding principle of constitutional avoidance, but also this Court's recent instructions to use this approach in ADA cases against States. See *United States v. Georgia*, 546 U.S. 151 (2006). Indeed, the Court in this very case vacated an earlier decision and remanded with instructions to follow *Georgia*, because the Sixth Circuit had reached the Eleventh Amendment issue even though it found that Haas failed to state a claim. In its new decision, by contrast, the Sixth Circuit correctly stopped with the statutory analysis, as *Georgia* mandates, and it therefore never reached the Eleventh Amendment issue that Haas now raises. Not only is that reason

enough to deny review, but the Eleventh Amendment issue is not worthy of review in the abstract, because the circuits have not split on the issue since this Court last addressed it in *Georgia* and *Tennessee v. Lane*, 541 U.S. 509 (2004).

Even if Haas were right on the merits of whether the Sixth Circuit erred in finding that she failed to state an ADA claim—and she is not—the factbound assessment of her claim in an unpublished decision does not warrant review. Haas does not allege a circuit split on the issue; rather, she insists that the Sixth Circuit did not properly follow its own precedent regarding whether the State's ownership of a building, without more, can render the State liable under the ADA. But as the Sixth Circuit noted, Haas never alleged that the State had built or renovated the building after the ADA was enacted, and under settled ADA law, no building owner can be liable without that trigger.

Finally, Haas's other ancillary issues do not warrant review. The judicial immunity question that she seeks to revive is not presented because she never named the judge as a defendant, nor has she explained how the State is liable for his acts. In any case, such immunity is well-settled and is not worthy of the Court's attention. And her remand issue—her claim that the Sixth Circuit did not obey the Court's instructions to consider the United States's views—is a nonstarter. Not only did the Sixth Circuit consider those views, but as the United States explains in its own opposition, the Sixth Circuit *followed* the United States's approach.

For these and other reasons below, the Court should deny Haas's Petition.

COUNTERSTATEMENT OF FACTS

Because Haas's statement does not fully reflect the case's procedural posture and the nature of the Sixth Circuit decision at issue, this Counterstatement addresses the case's full history.

A. Haas sued the State over her court-directed commitment to a privately run driver-intervention program.

Rachel Haas permanently disabled herself when she drove an all-terrain vehicle while drunk, crashed into a truck, and sustained severe injuries. See Amended Complaint, Petition Appendix ("Pet. App.") 59g-60g. At her criminal trial, she pleaded guilty to driving under the influence of alcohol. *Id.* at 60g. As an alternative to incarceration for her DUI conviction, Judge Richard Kubilus of the Canton Municipal Court ordered her to attend a driver intervention program run by Quest Recovery Systems, Inc. ("Quest"), a private entity. *Id.* at 60g-61g. She was to undergo two six-day driver intervention programs ("DIPs") conducted by Quest. *Id.* at 61g.

The State of Ohio—as part of a comprehensive program for the provision of alcohol and drug addiction services—certifies all of the DIPs that private entities run throughout the State. Ohio Rev. Code §§ 3793.02(B), 3793.10; Ohio Admin. Code § 3793:4-1-01 *et seq.* DIPs are designed to screen, educate, and refer those who are arrested or convicted for driving under the influence:

> A driver intervention program is a program of screening, education and referral for individuals who are arrested and/or

> convicted of operation of a vehicle or water craft under the influence of alcohol and/or a drug of abuse . . . .

Ohio Admin. Code § 3793:4-1-01(C). Ohio law does not certify six-day DIPs, but recognizes only 48-hour and 72-hour DIPs. Ohio Admin. Code § 3793:4-1-02.

Ohio law requires that all entities providing DIPs must "be in compliance with all applicable federal, state, and local laws and regulations," including the ADA and its state and local equivalents. Ohio Admin. Code § 3793:4-1-01(R). In addition, a DIP may not discriminate on the basis of disability and must make its programs available to disabled clients. Ohio Admin. Code § 3793:4-1-02(GG)(12). Ohio law also requires DIPs to meet specific handicap accessibility requirements or have on file a plan for meeting those requirements. Ohio Admin. Code § 3793:4-1-02(CC). If a DIP fails to comply with any requirement, Ohio's Department of Alcohol and Drug Addiction Services can decertify it or otherwise enforce the requirements. Ohio Admin. Code §§ 3793:4-1-01(L); (O); Ohio Rev. Code § 3793.99.

Haas alleged that Quest—a private entity—discriminated against her in the program by failing to accommodate her disabilities. First Amended Complaint ("FAC") ¶¶ 18-30, Pet. App. 62g-65g.

Haas had initially sued both Quest and the City of Canton, but she amended her complaint to remove the city and add the State of Ohio, raising state law claims against Quest and federal claims under the ADA and the Rehabilitation Act, 29 U.S.C. § 794(a),

against both Quest and the State. FAC ¶¶ 31-46, Pet. App. 65g-68g. [1]

Haas alleged that the State was liable because it "was directing certain individuals, through its Municipal Court system, to participate in programs and activities such as that being operated by Quest in lieu of actual incarceration." FAC ¶ 37, Pet. App. 66g. She also alleged that "the Court and/or State" violated Title II by "failing to ensure that [she] was able to participate in and benefit from the services, programs, and activities that were being furnished to non-handicapped individuals." *Id.* She further alleged that "the Court and/or State" discriminated by "ordering her to be confined in a privately operated system that was not handicap accessible." *Id.*

The State of Ohio moved to dismiss the ADA claims for failure to state a claim and, in the alternative, on the basis of Eleventh Amendment immunity. The District Court granted that motion. Opinion and Memorandum, Pet. App. 23e-40e.

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[1] Haas's claims against Quest are no longer at issue, as she separately settled with it, as noted below. She had once claimed that Quest was the State's agent, FAC ¶ 16, Pet. App. 61g, but her separate acknowledgment that Quest is private, FAC ¶ 3, Pet. App. 59g, along with her settlement with Quest, removes Quest as a basis for liability against the State.

In addition, Haas's parents joined her as Plaintiffs to pursue a loss of consortium claim against Quest, but because that claim is no longer at issue, the State refers to Haas in the singular as the sole remaining Plaintiff and as Petitioner here.

Haas then settled all her remaining claims against Quest and the State.[2] Therefore, the only remaining issue in this case is Haas's appeal of the dismissal of her Title II claims against the State of Ohio.

B. The Sixth Circuit initially affirmed dismissal of Haas's claims, addressing both statutory and constitutional issues.

On appeal, the Sixth Circuit Court of Appeals affirmed the dismissal of all Title II claims against the State of Ohio because the alleged discriminatory acts were all performed by a private party—Quest—without the State's knowledge or approval. *Haas v. Quest Recovery Servs.*, 174 F. App'x 265 (6th Cir. 2006) (*Haas I*), Pet. App. 8c-22c. Despite finding that Haas failed to state an ADA claim, the Sixth Circuit also addressed whether Congress had validly abrogated the State's Eleventh Amendment immunity with regard to Title II claims such as Haas's. The Sixth Circuit had previously decided that a Title II claim did not overcome State immunity if the claim rested entirely on an equal protection theory—that is, if the claim focused solely on differential treatment between the disabled and

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[2] Justice Ginsburg, concurring in the Court's remand order, questioned whether the State's settlement with Haas included any ADA claims. *Haas v. Quest Recovery Servs.*, 127 S. Ct. 1121, 1122 (2007) (Ginsburg, J., concurring). That settlement included all of the then-extant claims against the State, but because the District Court had by then dismissed the ADA claim, the ADA claim was not included in the settlement. Thus, the ADA claims survived the settlement. To the extent that any of the State's previous statements about the settlement indicated a broader scope, such statements are incorrect.

the non-disabled. *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 816 (6th Cir. 2002) (en banc). But *Popovich* also held that if a Title II claim implicated a different constitutional right, such as the due process right to access to courts, the claim overrode the State's immunity. *Id.* Following this framework, the Sixth Circuit held that Haas's claim sounded more in equal protection than in due process, so her claim did not overcome the State's immunity. Pet. App. 20c-21c.

Notably, in reaching the Eleventh Amendment issue, the Sixth Circuit did not follow this Court's then-recent instruction in *United States v. Georgia*, 546 U.S. 151 (2006), which admonished courts to reach that constitutional issue only if a plaintiff first stated a viable ADA Title II claim.

C. This Court vacated the Circuit's first opinion and remanded for consideration of the United States' views.

Haas petitioned the Court for certiorari, and the United States intervened. The United States objected that it had not been notified of the case, even though 28 U.S.C. § 2403(a) requires such notification when a federal statute is challenged, and the State's claim of Eleventh Amendment immunity amounted to such a challenge. The United States further explained that in its view, the Court should grant the petition, vacate the opinion below, and remand for the Sixth Circuit to consider the views of the United States. More specifically, the United States urged that the Sixth Circuit should have applied the three-step analysis articulated in *U.S. v. Georgia*.

The Court agreed with the United States and remanded the case to the Sixth Circuit to consider the views of the United States. *Haas v. Quest Recovery Servs.*, 127 S.Ct. 1121, 1122 (2007). In a concurrence, Justice Ginsburg noted that if the Circuit had properly applied *Georgia*, "it might not have reached the question whether Title II of the [ADA] abrogated the State of Ohio's Eleventh Amendment immunity with respect to [Haas's] claims." *Id.* (Ginsburg, J., concurring). That was so, she explained, "because the Court of Appeals also held that petitioners failed to state a claim for relief against Ohio under Title II." *Id.* Justice Ginsburg also urged the Sixth Circuit to address, on remand, how it concluded that Haas failed to state a claim. *Id.*

D. On remand, the Sixth Circuit applied *Georgia* and concluded again that Haas failed to state a claim, and this time it did not reach the Eleventh Amendment issue.

On remand, the Sixth Circuit directed all parties to submit letter briefs addressing the issue. The United States submitted a brief as intervenor, urging the court to follow *Georgia*. As the United States summarized in its Opposition to this Petition, the federal "government argued that, if the court again determined that [Haas] did not state a valid Title II claim against the State, then the court should not reach the question whether Title II validly abrogated the State's sovereign immunity." U.S. Br. at 8. The United States also urged that if the court did find that Haas stated a claim, then it should proceed with the second and third steps of

Georgia. *Id.* The United States expressed no view as to whether Haas stated a claim.

The State, in its letter brief, said, as did the United States, that the court should not continue if it first found that Haas did not state a claim. Unlike the United States, the State urged the court to find that Haas failed to state a claim.

Haas, in her brief, argued that she did state a claim, and that Title II abrogated the State's immunity in her case. In particular, she asserted that, because she stated an actual constitutional violation, her claim overrode the State's immunity without resort to Congress's prophylactic power to abrogate immunity as to some acts that violate the ADA but do not violate the Constitution.

The Sixth Circuit's second opinion tracked the *Georgia* analysis, and the court again concluded that Haas failed to state a claim. *Haas v. Quest Recovery Servs.*, 247 F. App'x 670 (6th Cir. 2007) (*Haas II*), Pet. App. 2b-7b. As *Georgia* instructs, the Sixth Circuit stopped its analysis there. *Id.* at 7b.

In explaining why Haas failed to state a claim, the Sixth Circuit said that Haas never alleged that the State itself did anything to trigger liability under Title II. First, the court noted that the complaint named the local judge as a State actor, and on that score, the Circuit referred to its earlier decision regarding judicial immunity. *Id.* at 6b. Second, the court noted that landlord liability, based on the State's ownership of the building, would attach only if the State had renovated the building. That was so, the court explained, because the ADA did not require landlords to retrofit old buildings unless the landlord

performed "extensive renovation." *Id.* (citing 28 C.F.R. § 35.350(b)(1)). Haas did not allege any such renovations, so she did not allege facts that could, if true, trigger State liability based on its status as a landlord. *Id.*

Haas now petitions the Court to review the Sixth Circuit's second, newer decision.

REASONS FOR DENYING THE WRIT

A. Haas's question regarding her failure to state a claim under Title II of the ADA does not warrant review.

The Sixth Circuit resolved this case at the first step of the *United States v. Georgia* analysis. Once the court found that Haas failed to state a Title II claim, it did not address the constitutional issue of whether a validly stated Title II claim could hypothetically overcome the State's Eleventh Amendment immunity. For this Court to reach the constitutional issue, then, Haas must first show that the Sixth Circuit erred on the statutory question. And that factbound question is not worthy of this Court's review because the Sixth Circuit correctly applied settled ADA law and Rule 12(b)(6) standards to this case's facts.

1. Haas's factual allegations do not state a claim under any possible theory of ADA Title II liability.

Haas's sole allegations against the State, in ¶¶ 37-38 of the amended complaint, do not state a claim. She says that "the State was directing certain individuals, through its Municipal Court system, to participate in programs" such as Quest's, and that the program violated the ADA. Haas names no state actor here, so her theory is unclear. See FAC ¶¶ 37-38, Pet. App. 66g-67g.

At most, three possible theories exist, but none helps Haas survive dismissal. First, she might argue that the State has arranged the DIP program in such a way as to cause discrimination. But she alleges no facts to support that theory, and indeed, the many

state laws that require compliance with the ADA and other standards show that any allegation or program-wide discrimination is not viable. See, e.g., Ohio Admin. Code § 3793:4-1-01(R) (requiring DIPs to "be in compliance with all applicable federal, state, and local laws and regulations," including the ADA and its state and local equivalents); Ohio Admin. Code § 3793:4-1-02(GG)(12) (providing that DIPs may not discriminate on the basis of disability and must make its programs available to disabled clients); Ohio Admin. Code § 3793:4-1-02(CC) (requiring DIPs to meet specific handicap accessibility requirements or to file a plan for meeting those requirements).

Second, by alleging that the State directs people "through its Municipal Court" into discriminatory programs, Haas might be alleging that the municipal court's act in sending her to Quest was an ADA violation, and that the State is responsible for that. But she did not name the judge or court as a co-defendant, and, as the Sixth Circuit found in its first opinion and repeated in its second, Judge Kubilus has absolute judicial immunity for his sentencing decision. *Haas I*, Pet. App. 15c; *Haas II*, Pet. App. 5b-6b. (And, as further detailed in Part C below, she presents no sound reason for reviewing judicial immunity as an independent question presented.)

Third and finally, Haas's complaint could be generously read, as the court below did, to allege that the State's role as owner of the building at issue triggers ADA liability. See FAC ¶ 14, Pet. App. 61g. But a claim of ownership, standing alone, does not trigger liability without the additional factual allegation—absent here—that the building falls

under the ADA—that is, that it was built or extensively renovated after the ADA was enacted.

The ADA does not require a public entity to make its existing physical facilities accessible. 28 C.F.R. § 35.150(a)(1). Only if the building has undergone construction or alteration after Title II's effective date does it require upgrades to provide accessibility. 28 C.F.R. § 35.151; see also *Lane*, 541 U.S. at 532 (citing 28 C.F.R. § 35.150(b)(1)). Haas fails to allege (1) that the building was built after the effective date of the ADA, or (2) that if it was built earlier, there was any construction or alteration after the effective date, or (3) any other facts establishing that the State of Ohio was required to make the facility in which she was housed accessible.

In short, Haas does not state a claim against the State of Ohio under Title II of the ADA, and nothing about her failure to state a claim warrants review.

2. The decision below applied settled ADA law and normal pleading standards to Haas's facts.

As explained above, the Sixth Circuit correctly found that Haas failed to state a claim. But even if the court were somehow wrong, its statutory conclusion is not worthy of review because it involves solely the application of settled law to Haas's facts. Haas seeks to convert this routine factbound application into a question of pleading standards, but her attempt to do so fails, as the Sixth Circuit applied well-settled legal standards, both as to ADA law and to the Rule 12(b)(6) standard, in finding her allegations insufficient to state a claim.

As noted above, the Sixth Circuit focused on remand on what seems now to be Haas's primary theory—that the State is liable as the landlord or building owner—and the court found that Haas did not state a claim under that theory. That is so because no building owner, whether as a landlord or otherwise, is obliged to update older pre-existing buildings to bring them into compliance with the ADA. Pet. App. 6b. Building owners need only do so when they perform "extensive renovations" on the building. *Id.* (citing 28 C.F.R. § 35.350(b)(1)). Haas never alleged that the State even had an ADA-compliance duty—that is, that it built or renovated the building after the ADA's 1991 enactment. Accordingly, she failed to state a claim.

Haas attempts to circumvent this pleading shortcoming by accusing the Sixth Circuit of requiring heightened pleading for Title II, or suggesting that *United States v. Georgia* somehow lowered the Title II pleading standards. But neither argument is correct. *Georgia* merely repeats the statutory definition in 42 U.S.C. § 12132, without indicating anything more about "stating a claim" under Title II. Nor has Title II itself changed in any way significant to Haas's allegations since her complaint was filed. Thus, the Sixth Circuit merely applied well-tested pleading standards and indisputable ADA law in dismissing Haas's claim.

Just as the Sixth Circuit applied well-established ADA law, so, too, did it use the normal Rule 12(b)(6) standard in conjunction with that ADA law, not any heightened pleading standard. Thus, Haas also fails in her attempt to invoke Rule 12(b)(6) or Rule 8(a) broadly as issues warranting review.

When reviewing an appeal from a district court's Rule 12(b)(6) dismissal, a court must accept all factual allegations as true, but need not accept as fact legal conclusions or unwarranted factual inferences. *Papasan v. Allain*, 478 U.S. 265, 283, 286 (1986). In addition, a court reviewing a Rule 12(b)(6) dismissal does not properly consider evidence outside the complaint. See, e.g., Fed. R. Civ. P. 12(d); Notes of Advisory Committee on 1946 amendments ("[O]n a motion under Rule 12(b)(6) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56."); *Saglioccolo v. Eagle Insurance Co.*, 112 F.3d 226, 231 (6th Cir 1997).

Thus, Haas must rely exclusively on the factual allegations in her complaint, not on any legal conclusion, unwarranted factual inferences, or facts not in the complaint itself. Any facts or conclusions in her later briefs, including in the Petition, do not matter unless she can point to facts in the complaint sufficient to state a claim.

And, as shown above, none of her possible theories of liability are supported by sufficient allegations in the Amended Complaint. She cannot now, for example, assert more about the building, such as a renovation history—nor does she even try. Nor can she ask for unwarranted inferences about the building, or about the judge's actions, or about any other allegation that might shore up any of her theories of liability. Her complaint's allegations fell short, under standard Rule 12(b)(6) analysis, and that shortcoming does not warrant review.

B. The Eleventh Amendment issue does not warrant review here, both because it was not reached below and because the issue is not worthy of review anyway.

1. This case is a not a suitable vehicle to review the Eleventh Amendment issue, because that issue was not, and should not be, reached.

This Court cannot reach Haas's Eleventh Amendment argument because, as explained above, the Sixth Circuit correctly found that she failed to state an ADA claim. Even if Haas were right on the statutory issue, though, the constitutional issue would not warrant review, for two reasons. First, Haas still needs to clear several hurdles under *Georgia's* three-step analysis. Second, Haas would need the Court to abandon both its firm practice against deciding issues not addressed below, *NCAA v. Smith*, 525 U.S. 459, 470 (1999), and its "'deeply rooted' commitment 'not to pass on questions of constitutionality' unless adjudication of the constitutional issue is necessary," *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (quoting *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

Haas needs to clear all three *Georgia* hurdles to reach her constitutional issue, but she cannot clear any. First, this Court would need to scrutinize Haas's complaint to determine "which aspects of the State's alleged conduct violated Title II," 546 U.S. at 160, and it would have to reverse the Sixth Circuit on that score. Second, in new territory, the Court

would need to determine "to what extent such misconduct *also* violated the Fourteenth Amendment." *Id.* That is, the Court would have to scrutinize the complaint again, looking this time for a Fourteenth Amendment violation. Third, the Court would then ask, "insofar as such misconduct violated Title II, but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Id.*

Even if Haas were able to clear those three *Georgia* hurdles, Haas would need to ask the Court to address the complicated question of abrogation without benefit of any review below. As the Court's several Eleventh Amendment cases show, the abrogation question typically involves extensive review of the congressional record involved in adopting the statute at issue—here, the ADA's Title II—as part of analyzing whether the statute is a "congruent and proportional" use of the Congress's power to abrogate State immunity. See, e.g., *Lane*, 541 U.S. at 516-17, 522-27 (examining record as to ADA Title II); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-728 (2003) (same, as to Family and Medical Leave Act); *City of Boerne v. Flores*, 521 U.S. 507, 530-33 (1997) (same, as to Religious Freedom Restoration Act). Haas would have the Court do all that in the first instance, with no lower-court analysis at all.

In sum, this case almost certainly would not allow the Court to reach Haas's Eleventh Amendment argument at all.

2. The Eleventh Amendment issue does not even warrant review, as the circuits are not split on the issue.

Even if the Court could clear the several legal and prudential issues above to reach the constitutional issue, the question of the States' Eleventh Amendment immunity does not warrant review, even in the abstract, and the split Haas claims does not exist. Haas's fundamental error is that she attacks the Sixth Circuit's 2006 decision in *Haas I*, not the opinion after remand in 2007 in *Haas II*. And she looks to outdated case law in both the Sixth Circuit and other circuits, from before this Court clarified abrogation issues regarding Title II in both *Georgia* and *Lane*.

First, and notably, as evidence of the Sixth Circuit's side of the alleged "split," she repeatedly cites *only* the Circuit's *first* decision in this case, not the decision from which she now petitions. See Pet. at 13 n. 5 (citing *Haas I*); *id.* at 15, 17 (same). But this Court has already vacated that decision, so it cannot be the basis for a circuit split.

Second, Haas additionally relies on a pre-*Lane* Sixth Circuit case as evidence of the Circuit's view on abrogation, but the Circuit has apparently never relied on that decision since *Lane*. See Pet. at 15 (citing *Popovich*, 276 F. 3d 808). In *Popovich*, the Sixth Circuit had, as Haas explains, see Pet. at 15, developed the theory that ADA Title II claims could overcome Eleventh Amendment immunity if those claims are based on "unreasonable exclusion from judicial proceedings based on disability in a due process-type claim," but not if the claims "are based

on equal protection principles." *Popovich*, 276 F.3d at 816. Haas is right in her general description of *Popovich*, but she is mistaken in insisting that "the Sixth Circuit persists in abiding by the *en banc* ruling in *Popovich*." Pet. at 15.

This Court's *Lane* decision in 2004 reshaped the landscape regarding abrogation of State immunity as to various types of ADA Title II claims, and the Sixth Circuit has not addressed the issue since *Lane*. In *Lane*, the Court agreed with the Sixth Circuit that the abrogation question was not a global one as to all Title II claims, so it limited its review to the immediate question of Title II claims concerning access to courts. *Lane*, 541 U.S. at 530 ("[N]othing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole."). This Court's *Lane* decision discussed *Popovich* because both *Lane* and *Popovich* involved access to courts. But while the Court agreed with the Sixth Circuit on one side of the *Popovich* coin—namely, that court access claims did trump State immunity—the Court did not in any way address the other side of *Popovich*, namely, the decision that other claims, such as those "based on equal protection principles," could *not* trump immunity.

In the four years since *Lane* set a new framework, the Sixth Circuit has not returned to the issue, and Haas's claim that the Circuit "persists" is puzzling. She cites no post-*Lane* case from the Circuit, other than the vacated 2006 *Haas I* decision. Nor could the State find any. Likewise, as the United States notes, the Sixth Circuit shows no signs of relying on *Popovich*. U.S. Br. at 12-13 ("Indeed, except for the now-superseded opinion in this case,

the Sixth Circuit has not adhered to *Popovich* in any reported disposition since this Court decided *Lane*."). While the State might disagree with the United States on its specific claim that *Popovich* and *Lane* are "irreconcilable," U.S. Br. at 12, or on the general issue of the scope of abrogation versus immunity as to other Title II claims after *Lane*, the State agrees fully with the United States in its description of the current state of the law in our Circuit.

The State also agrees with the United States's conclusion that no split exists among the circuits nationwide. *Id.* at 12-14. Haas's view of the split depends on placing the Sixth Circuit on one side, with other circuits that have spoken uniformly on the other side. Once the Sixth is removed, as it must be, no split—soft or hard, old or new—remains.

With no division of authority, the details of the other circuit cases do not matter. Nevertheless, the common point is that the courts in those cases *did reach* the Eleventh Amendment issue, and all found abrogation, either globally or as to the claims at issue. Thus, none forms a conflict with each other, let alone with the decision below, in which the Sixth Circuit did not reach the issue at all. See Pet. at 16 (citing *Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006) (finding abrogation in that case); *Phiffer v. Columbia Riv. Corr. Inst.*, 384 F.3d 791 (9th Cir. 2004) (finding global abrogation for Title II claims); *Association for Disabled Americans v. Florida Intl. Univ.*, 405 F.3d 954 (11th Cir. 2005) (finding abrogation in that case)); see also U.S. Br. at 12-13 (summarizing the lack of any conflict here).

Consequently, even if the Eleventh Amendment were raised here, that issue does not currently warrant review.

C. Haas presents no other issue warranting review.

Haas raises several other issues that are not worthy of the Court's attention.

Haas's second Question Presented concerns judicial immunity, and that issue does not warrant review. Such immunity is well-settled, and while Haas tries to add currency by questioning whether immunity applies to "sentencing orders that result in an individual suffering [illegal] disparate treatment" the Court has already held that absolute judicial immunity applies with undiminished force even when the judge is accused of discriminating on the basis of race. *Pierson v. Ray*, 386 U.S. 547, 553-555 (1967). Haas shows no lower-court confusion on the issue or any other reason to revisit this settled law.

Further, although the court below cited judicial immunity in ruling against Haas, her attempt to base State liability on the judge's sentencing order fails in two other independent ways. Haas can claim a Title II violation by this path only if she alleges (1) that the judge did something that amounts to a violation, (2) that the judge's acts are attributable to the State and (3) that she overcomes judicial immunity. First, Haas did not name Judge Kubilus as a defendant, and in describing his acts, she openly admits that "there is no reason whatsoever to believe that Municipal Judge Kubilus had intended for [Haas] to be confined in a non-compliant facility." Pet. App. 21. Second, she does not show that the

municipal judge is a state agent as a matter of law, and Ohio law has long held that he is not. See *State ex rel. Thompson v. Wall*, 28 Ohio Dec. 631 (1914) (holding that municipal judge is not a State officer). Thus, the court need not have reached the judicial immunity issue.

Further, Justice Ginsburg's question in her concurrence regarding judicial immunity is best answered by considering Haas's failure to establish any theory of liability based on the judge's acts to begin with. Specifically, Justice Ginsburg noted that "no judge was named a defendant" and questioned the authority for "according the benefit of judicial immunity to defendants who are not judges." *Haas*, 127 S.Ct. at 1122 (Ginsburg, J., concurring). The answer is that the lack of a judicial defendant, coupled with Haas's admission that the judge did nothing wrong, means that Haas has no theory of liability through the judge to begin with. Immunity, therefore, does not matter.

Thus, Haas's second Question Presented does not warrant review.

Haas's third Question Presented combines two notions: (1) that the Sixth Circuit did not follow this Court's remand instructions "to consider the views of the United States," and (2) that the Circuit held her to a higher pleading standard. As to the first, the court did consider the United States' views: the United States urged the Sixth Circuit not to reach the constitutional issue if the court again found that Haas failed to state a claim, and that it exactly what the court did. See U.S. Br. at 10 ("[T]he court of appeals' disposition on remand is fully consistent with the position the United States urged."). As to

the second, the State's explanation of the pleading standard above (at 12-13), covers why that issue is a nonstarter.

Finally, Haas's fourth Question Presented essentially restates the heightened pleading standard in another way, suggesting that it was unfair to hold Haas's "60-paragraph" complaint to the standard of *Georgia*. First, as explained above, the Sixth Circuit did not apply any heightened pleading standard. Second, the points on which *Haas* stumbled were not in any way affected by *Georgia;* she failed to state a claim under established ADA law. *Georgia*'s significance here is the importance of resolving the statutory ADA issue before reaching Eleventh Amendment issues, but *Georgia* changed nothing about how to resolve whether a claim is stated. Thus, nothing about this Question Presented warrants review.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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